

2111428 (MIGRATION) [2022] AATA 1461 (25 MARCH 2022)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 2111428

MEMBER: Wan Shum

DATE: 25 March 2022

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision to cancel the applicant's Subclass 189 - Skilled - Independent visa.

Statement made on 25 March 2022 at 10:57am

CATCHWORDS

MIGRATION – cancellation – Skilled Independent (Permanent) (Class SI) visa – Subclass 189 (Skilled – Independent) – incorrect information and bogus documents given with visa application – secondary applicant's claimed relationship and residence with primary applicant – forensic examination showed fraudulent alteration of bank statements and telephone bills – separate travel to home country and addresses on primary applicant's incoming passenger cards did not match address in application – department's notice sent to applicant's last known address returned marked 'not at this address' – discretion to cancel visa – applied after student visa ceased and working visa refused – claim of reliance on agent – no other supporting evidence provided – business and property ownership – hardship if visa cancelled – primary visa holder's visa cancelled and departed Australia – applicant's application for citizenship withdrawn – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 101, 103, 107, 109, 375A
Migration Regulations 1994 (Cth), r 2.55; Schedule 2, cl 189.211; Schedule 4, PIC 4020

CASE

MIAC v Khadgi (2010) 190 FCR 248

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to cancel the applicant's Skilled Independent visa Subclass 189 under s 109(1) of the *Migration Act 1958* (Cth) (the Act). The applicant was granted this visa on the basis of her claimed relationship with [Mr A] as his spouse or de facto partner.
2. The delegate cancelled the visa on the basis that the applicant had breached ss 101(b) and 103 as it appeared that she was not in a genuine relationship with [Mr A] as claimed and had thus provided incorrect information and bogus documents to facilitate the grant of the visa. The issue in the present case is whether the ground for cancellation is made out, and if so, whether the visa should be cancelled.
3. The decision to cancel the visa was made on 25 August 2021 and applicant has sought review of that decision with the Tribunal. The applicant is represented in relation to the review by a registered migration agent.
4. The applicant appeared before the Tribunal on 12 January 2022 by videoconference to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages. The representative was present throughout the Tribunal hearing.
5. The Tribunal was forwarded information from the Department relevant to the cancellation and a non-disclosure certificate was issued by an Immigration officer pursuant to s 375A of the Act in respect of internal correspondence sent between officers of the Department. The Tribunal provided a copy of the non-disclosure certificate to the applicant seeking her comments on the validity following the hearing. In response, it was acknowledged that the Tribunal had not released the information. The certificate is electronically dated and signed and the Tribunal considers that the reasons given for non-disclosure are specific, detailed and correctly identify the reason for non-disclosure, being the release of the documents being contrary to the public interest because it would disclose lawful methods for preventing, detecting and investigating breaches or evasions of the law which would or be likely to prejudice to the effectiveness of those methods. The Tribunal is of the view that the certificate is valid, and notes in any case that the information referred to in the email correspondence to the extent they are relevant to the review, has been set out in the delegate's decision record, a copy of which was provided by the applicant.
6. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

BACKGROUND

7. The applicant first entered Australia as the holder of a student visa in April 2013. The applicant held a further student visa which ceased on 30 August 2015 and she did not hold a substantive visa again until 6 October 2017 when she was granted a Skilled Independent Subclass 189 visa on the basis of her relationship to [Mr A].
8. During that gap, she had applied for a Subclass 457 visa on the basis of sponsorship by [Company 1] on 29 August 2015 for the position of [Occupation 1] but on 8 June 2016 a decision was made not to approve the nomination. Shortly after on 2 July 2016, [Company 2] nominated her for the position of [Occupation 2] which was not approved on 8 November 2016. The applicant's 457 visa was refused on 11 November 2016 on the basis that the

nomination made by [Company 1] had not been approved. In November 2016, [Company 2] and the applicant sought review of their respective decisions to refuse to approve the nomination and to refuse to grant a Subclass 457 visa. Both later withdrew from those applications for review in February and March 2018 respectively.

9. The applicant was named as a migrating family member on [Mr A]'s application for a Skill Independent visa which was lodged with the Department on 29 May 2017. This visa requires the applicants to make an expression of interest, which would likely have occurred after [Mr A] had achieved the English language score necessary in a Pearson Language test (PTE) December 2016 as referred to in her statutory declaration of 5 January 2022. The form was completed to show that the applicant was the spouse or de facto partner of [Mr A], and that their de facto relationship had begun on 5 April 2016. The residential address provided on the form was U62/545 Pacific Highway, St Leonards, NSW 2065 which is the location that the applicant claims that they began living together from January 2017 when [Mr A] "finished last PTE test".
10. Documents provided in support of the application to demonstrate co-habitation as a de facto couple included a statement that the applicant had seemingly prepared entitled "Love story" and the following documents:
 - Bank statements from [a] Bank for account number [number] in the names [Mr A] and [the applicant] for the period 1 July 2016 to 31 December 2016 at the address of 'Unit 43, 38 Shoreline Drive, Rhodes NSW 2138'.
 - Telephone bills from [Telecommunications company] for the period 21 December 2015 to 20 January 2016 in the name [the applicant] at 'Unit 43/38 Shoreline Drive, Rhodes NSW 2138'
 - Telephone bills from [Telecommunications company] for the dates 15 March 2016 to 14 October 2016 in the name [Mr A] at 'Unit 43/38 Shoreline Drive, Rhodes NSW 2138'
11. The submissions make reference to the application being lodged in May 2017 in China, and in her statutory declaration of 5 January 2022, the applicant states that they went back to China "firstly together". The Departmental movement records indicate that [Mr A] departed Australia [in] May 2017 as the holder of a BVA, while the applicant departed for China the following day. In his email of 2 August 2021 to a Departmental email address visa.cancellations@homeaffairs.gov.au, a copy of which was provided to the Tribunal by the applicant, [Mr A] states that the reason he departed in May 2017 was because he had let his student visa lapse so needed to depart Australia to await the outcome of the Subclass 189 visa application. When asked about the travel being together as declared in her statutory declaration when it did not appear that they had taken the same flight, the applicant claimed at the hearing that [Mr A] had gone to China one day early to talk to his family in Guangzhou and due to issues with a friend and that she was to join him the next day so she could meet his parents. She confirmed her claim in the declaration that this never eventuated and said that she went to Shanxi, where she had lived prior to coming to Australia, and the Tribunal has doubts that she "stayed in Guangzhou" with [Mr A] as declared in the statutory declaration.
12. The applicant returned to Australia in July 2017 which she declares was for work reasons, although earlier in the statutory declaration she states that she worked for [Company 1] from July 2015 to July 2016 and [a workplace] from July 2016 to May 2017 and it unclear the nature of the work engagements in July 2017.

13. The Subclass 189 visas were granted on 6 October 2017. [Mr A] returned to Australia [in] November 2017.
14. On his incoming passenger cards on his arrivals to Australia [in] August 2016 [and] November 2017, [Mr A] did not give his intended address as any of those listed on the visa application form or the bank statements and telephone bills referred to above. The submissions refer to [Mr A] choosing to stay at his friend's place at Wolli Creek on his return and claimed that prior to that, he had not used the Rhodes address but kept his address in Kingsford as his parents were going to visit him for his graduation in June 2016. It does not appear that [Mr A] ever used the St Leonards address, other than in respect of a joint bank account which the applicant claims was opened on 14 February 2017, a copy of which was not provided. There is no evidence that he ever used the account.
15. An application for Australian citizenship was made for the applicant on 9 October 2018 but later withdrawn in August 2019. It was indicated on the citizenship application form lodged in her name that her de facto/ spouse is [Mr A].
16. Following a forensic examination by the Department of documents provided for the Skilled Independent visa application, it was determined on 7 June 2019 that the bank account and [Telecommunications company] documents listed above had been fraudulently altered. Given this, it was suspected that the applicants provided bogus documents to the Department in support of the claimed de facto relationship and incorrect answers in the application for the Subclass 189 visa. The delegate sent the applicant a notice of intention to consider cancellation (NOICC) of her visa setting out the alleged breaches by registered mail on 19 July 2021 to an address at Cecil Street, Gordon NSW 2072 which was the address given on the citizenship application. It appears from the Department file that the notice was returned to sender on 4 August 2021 with the notation 'NATA' which would appear to be short for 'not at this address'. No response was received to the NOICC and the applicant's visa was then cancelled on 25 August 2021. [Mr A] last departed Australia on 14 January 2020 and has not returned. It appears that his visa has been cancelled also.

CONSIDERATION OF CLAIMS AND EVIDENCE

The law

17. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss 101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
18. The exercise of the cancellation power under s 109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s 107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s 107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision. While the decision maker must consider the applicant's response (if any) to the s 107 notice about the non-compliance, and have regard to any prescribed circumstances: s 109(1)(b) and (c), so long as the notice is given by one of the methods set out in reg 2.55(3), it is irrelevant whether or not the applicant in fact received the notice.
19. In this case, the method of notification chosen by the delegate was to send the letter by registered post to the person's last residential address known to the Minister which on 19 July 2021 was an address at Cecil Street, Gordon NSW 2072.

The notice

20. The delegate considered that, when completing the visa application form, the applicant had breached s 101(b) by providing details of a claimed de facto relationship status with [Mr A] which purportedly began on 5 April 2016 and answering 'Yes' to the declarations on page twelve, that she and [Mr A] had provided complete, correct and up-to-date information in the application.
21. The delegate considered that the applicant had breached s 103 by providing a bogus document, by reference to paragraph (b) of the definition of 'bogus document' in s 5(1), that the following documents were counterfeit or had been altered by a person who does not have authority to do so:
 - bank statements from the [Bank] for account number [number] in the names [Mr A] and [the applicant] for the period 1 July 2016 to 31 December 2016 addressed to Unit 43, 38 Shoreline Drive, Rhodes NSW 2138;
 - telephone bills from '[Telecommunications company]' for the period 21 December 2015 to 20 January 2016 listed in the name [the applicant] with the address of Unit 43/38 Shoreline Drive, Rhodes NSW 2138
 - telephone bills from '[Telecommunications company]' for the dates 15 March 2016 to 14 October 2016 in the name [Mr A] with the address of Unit 43/38 Shoreline Drive, Rhodes NSW 2138
22. Reference was made to the intended addresses [Mr A] declared on his incoming passenger cards (IPC) [in] August 2016 and November 2017, which did not match with those listed in the statements or on the visa application form. The delegate considered that these differing addresses indicate that the applicant did not reside with [Mr A] in a de facto relationship at the time of lodgement of, or the grant of, the Skilled Independent visa.
23. The NOICC set out that the answers given regarding the date the relationship commenced appeared incorrect because the Department's examination of the '[Telecommunications company]' phone bills and [bank] statements listed above were intentionally altered to demonstrate that they were residing at the same residence, and that they were in a genuine relationship since 5 April 2016.
24. The NOICC referred to the '[Telecommunications company]' phone bills and [bank] statements as documents that were considered 'bogus documents' within the meaning of part (b) of section 5(1) of the Act because a forensic examination undertaken by the Department, of the telephone bills from '[Telecommunications company]' in the applicant's name and in [Mr A]'s name, and the joint [bank] statements provided with the visa application, has found the residential address shown on the documents do not match the residential address officially linked and registered to those documents.
25. The NOICC states that it appeared that there is evidence of intentional alteration to the generation of the above documents to a degree that the only reasonable proposition is that the originating documents have been fraudulently altered to demonstrate that she was in a de facto relationship with, and resident at the same address as [Mr A] at the time of application lodgement and visa grant.
26. The NOICC refers to the bogus documents being provided to a departmental officer who was performing a function under the Act, namely the assessment of a visa application, such that it appeared that the applicant would have failed to comply with section 103 of the Act. The NOICC also stated that had the departmental officer been aware the documents were

bogus at the time of assessing the application, the applicants may have been found to not meet Regulation 189.211(1) and (3) because PIC 4020 would not have been met. However, it is not necessary for the documents to be connected to a visa criterion and the Tribunal has not considered whether PIC 4020 was or would have been met.

27. The NOICC was sent by registered mail on 19 July 2021 to an address at Cecil Street, Gordon NSW 2072, being the residential given on her citizenship application. It appears from the Department file that the notice was returned to sender on 4 August 2021 with the notation 'NATA' which would appear to be short for 'not at this address'.
28. A similar letter was sent by the Department on 30 July 2019 to the applicant at the email address [Email address 1] in respect of her application seeking citizenship conferral inviting her to comment on adverse information. The applicant was asked to comment on the information that the addresses on [Telecommunications company] bills in each of their names, and [bank] statements in joint names of 43/38 Shoreline Drive RHODES NSW 2138 has been intentionally altered and the true addresses for the correspondence was 66 Rothschild Avenue, Rosebery NSW 2018 and 601/6 Keats Avenue Rockdale NSW 2216. The letter goes on to explain that the information gives rise to the issue of whether the applicant had previously provided false and misleading information to the Department in order to engineer a migration outcome for herself that she would not have been otherwise entitled to, and in turn is seeking to use this to provide a migration outcome for others such as her claimed Parents for whom she currently had an application in progress. It was indicated that it would lead to a finding that she was not of good character. On 13 August 2019, the Department received a withdrawal in respect of her citizenship application.
29. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s 107 and that the NOICC complied with the statutory requirements including reg 2.55(3), regarding notification of the notice. As referred to above, on review, the applicant claims that she never received the NOICC letter dated 19 July 2021, although she did receive the cancellation decision which was sent to the same address in Gordon, the representative states through her property letting agent, and by email.
30. A courtesy copy of the visa cancellation decision appears to have been sent by email to two email addresses, [Email address 1] and [Email address 2], which was apparently received. The representative appears to take issue with the applicant only receiving the cancellation decision and not the NOICC, referring to the addresses used for the notification of the subsequent cancellation decision having been received on 25 August 2021 by email to [Email address 2] and mail to 2/12 Cecil Street, Gordon NSW 2072. The representative refers to the applicant living at the property in Gordon from August 2017 until 5 July 2021 when it was leased out and she moved to a property she had purchased at [Suburb].
31. The address in the suburb of Gordon was the residential address given with her citizenship application lodged with the Department in October 2018, and the Tribunal finds that this was the last residential address known to the Minister at the time the NOICC was sent.
32. The NOICC was only sent by registered mail and was returned to sender. The representative points out that she had moved from Gordon but that the applicant's email address [Email address 2] and phone [number] written on the Form 80 submitted to the Department in May 2017 had never changed. There is no requirement for notification to be sent to all previous known addresses and the Tribunal considers that the requirements of reg 2.55(3)(c) were met as it was sent to one of the last addresses known to the Minister.
33. In these circumstances, it was open to the delegate to proceed to a decision even though no response had been received from the applicant to the alleged breaches. In any case, the

failure to respond at the time is inconsequential as the Tribunal can consider her responses on review.

Was there non-compliance as described in the s 107 notice?

34. The issue before the Tribunal is whether there was non-compliance in the way described in the s 107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled. The non-compliance identified and particularised in the s 107 notice was non-compliance with sections 101(b) and 103 in the following respects:
- Provision of incorrect answers when details of a claimed de facto relationship status between the applicant and [Mr A] purportedly began on 5 April 2016, was declared on page one of the application form; and by answering 'Yes' to the Declarations on page twelve, both the applicant and [Mr A] declared that complete, correct and up-to-date information had been provided in the application.
 - Provision of bogus documents, specifically the bank statements from the [Bank] for account number [number] in the names [Mr A] and [the applicant] for the period 1 July 2016 to 31 December 2016 with the address of Unit 43, 38 Shoreline Drive, Rhodes NSW 2138; [Telecommunications company] Telephone bills for the period 21 December 2015 to 20 January 2016 listed in the name [the applicant] at Unit 43/38 Shoreline Drive, Rhodes NSW 2138; and [Telecommunications company] Telephone bills for the dates 15 March 2016 to 14 October 2016 in the name [Mr A] at Unit 43/38 Shoreline Drive, Rhodes NSW 2138.

Bogus documents

35. In considering whether the identified documents are bogus documents as defined, the Tribunal notes that the applicant herself claims that she and [Mr A] did not start a joint bank account until 14 February 2017. The applicant declares that she provided a copy of the statement for the period from 26 April 2017 to 15 May 2017 to '[Mr B]' which is not the same period as the statements. Given this, there does not appear to be any conclusion open in the circumstances other than that the statements given with the visa application for the period 1 July 2016 to 31 December 2016 for a bank account in both their names were altered to show their names at the Rhodes address. In respect of the addresses on the [Telecommunications company] phone statements, the applicant claims that she and [Mr A] did not pay attention to changing their addresses. It thus appears that she is conceding that neither party informed [Telecommunications company] of the Rhodes address and the Tribunal finds that the only reasonable conclusion is that these statements had been altered to reflect that each of their [Telecommunications company] accounts were connected to the same Rhodes address.
36. It is claimed that the applicant did not know what the requirements were for the grant of the visa and that she relied upon '[Mr B]' of [Agency] to lodge the visa application. She claims to have relied upon '[Mr B]' believing he was a professional, although there is no indication on the visa application form that the application was lodged with the assistance of another party and she has not provided any evidence of a service agreement or even any correspondence between them. The applicant has not provided any evidence that '[Mr B]' of [Agency] located at [Address], Sydney NSW 2000 exists but refers to his company being cancelled on 28 August 2018. Again, nothing was provided as evidence of this claim. The submissions point out that the email address for correspondence given in the applications for a "[Provider of Email address 1]" account would not have operated in China and that the application was lodged while both were offshore, so that the use of the [Provider of Email address 1] address lends support to their claim of relying on a dishonest third party. Interestingly, the notification

of the visa grant was sent to the [Provider of Email address 1] address listed on the application.

37. The only documents she admits to providing to '[Mr B]' in her declaration did not reflect that the parties had ever informed service providers that they had used the Rhodes address which it was claim they had lived at together since April 2016. While the applicant has not provided copies of these documents, it is submitted that the [Bank] Account which they opened in February 2017 reflected that their claimed address was in St Leonards. It is claimed in the submissions that [Mr A]'s [Telecommunications company] statements reflect the St Leonards address from 15 January 2017 to 14 April 2017, but that the documents prior to this were addressed to 22/50-54 Forsyth Street, Kingsford NSW 2032. The applicant's own statements which it was submitted that she provided to '[Mr B]' for the period 21 November 2015 to 20 December 2016 apparently reflected an address of U601/6 Keats Ave Rockdale NSW 2216. The only documents the applicant claims were given to '[Mr B]' then as evidence of living at the same address were from early 2017, and it is doubtful that she would have believed that the Department would accept that she had been in a de facto relationship with [Mr A] since April 2016, several months prior. The Tribunal is of the view that she understood this type of relationship as being different to a boyfriend/girlfriend relationship as she declares she became [Mr A]'s girlfriend in January 2016 and it was not until later that "he moved in to [her] place" in April 2016 and they "moved to...St Leonards together" in January 2017.
38. While the Tribunal is prepared to accept that the applications were not lodged by the applicant or [Mr A] personally as the email address given for correspondence on the visa application form does not appear to be one that [Mr A] used, given the number of years spent in Australia and the various visa applications she has made, it has doubts that the applicant believed that she would be granted a visa as the de facto partner of [Mr A] on the limited number of documents she claimed to have actually provided to '[Mr B]'.
39. Based on the applicant's statement in her statutory declaration that "[they] tried to locate common as much as possible the necessary documents as requested by [Mr B]", it appears that the applicant is claiming that any alterations to the documents were done by this person without her knowledge.
40. The Tribunal does not accept this claim and it is not necessary when making a finding as to whether there has been non-compliance with s 103 that the applicant (or [Mr A]) had personally altered the documents themselves. The Tribunal is of the view that the applicant understood that evidence of a de facto relationship would be given with the application and had relied on '[Mr B]' to present them as being in a de facto relationship. While the applicant may not have known how the evidence was going to be altered and presented for the application, the Tribunal is of the view that the applicant knew that this would occur, even if she did not give explicit instructions to '[Mr B]' to do so. The applicant's own evidence is that she entrusted '[Mr B]' with the entire process. It was submitted that the applicant and [Mr A] was lodged by '[Mr B]' which occurred when both parties were in China, which reflects that they would have informed '[Mr B]' when they had departed so that he could lodge the application for them. She then used his services for the citizenship application which on her own evidence was withdrawn with her knowledge and acquiescence. In these circumstances, the Tribunal considers that she caused the evidence to be given for this application by authorising '[Mr B]' to prepare and lodge the application on her and [Mr A]'s behalf and by doing so, gained a benefit in the form of permanent visas.
41. It is not necessary for the Tribunal to reach a concluded view on who altered the documents, but in this case, it would appear likely to have been '[Mr B]', or perhaps an associate of his. There is nothing to suggest that '[Mr B]' had authority to alter the bank account or [Telecommunications company] statements, nor any other person, and the Tribunal finds that

the documents were not altered by a person who had authority to do so. Having regard to her claim that she provided genuine documents to '[Mr B]' upon his request and agreed that he would "take control of the whole process", the Tribunal has formed the view that in the circumstances, the applicant had effectively caused these documents to be provided by relying upon '[Mr B]' to "prepare and lodge" the application as submitted, and had thus authorised him to lodge the application with the evidence given to support her claim to be member of the family unit of [Mr A].

42. The Tribunal finds on the evidence before it that the documents examined and listed above had been altered and reasonably suspects that the documents were altered by a person who does not have authority to do so. It therefore finds that the applicant gave, presented or provided to an officer, an authorised system, the Minister a bogus document or caused such a document to be so given, presented or provided. For this reason, there was non-compliance with s 103 by the applicant in the way described in the s 107 notice.

Incorrect information

43. The suspected information that was incorrect was that the parties were in a de facto relationship from April 2016.
44. Aside from the applicant's evidence and [Mr A]'s email, both of whom have a shared interest in not having their permanent visas cancelled, there is limited evidence before the Tribunal which would support the claim that the parties were in a de facto relationship from April 2016. Other than their own statements and the submission, no corroborative evidence was provided to the Tribunal that they were a couple who had a mutual commitment and a genuine and continuing relationship and lived together, or not permanently apart, at a shared address starting from April 2016.
45. In relation to a shared address not being provided to service providers, the applicant concedes that all the bills at Rhodes were in her name with the explanation that [Mr A] moved into an address she had already been residing at for a few years. In respect of the claimed shared address from January 2017 at St Leonards, the Tribunal was not provided with evidence that the rental agreement for the property was in both names nor any copies of bills for utilities issued in joint or both of their names for this address. The applicant claims to have opened a joint account with [Mr A] from 14 February 2017, and the submissions refer to copies of the bank account statements and [Mr A]'s [Telecommunications company] bill from January 2017 to April 2017 listing the St Leonards address, but did not provide evidence of this to the Tribunal. The applicant also claimed that she and [Mr A] had bought a property together through [Property developer] that has since become bankrupt, but the Tribunal was only provided with a copy of a creditor's claim against [Property developer] made by the applicant for the deposit for a property at Arncliffe.
46. In addition, the Tribunal considers that the information following the application lodgement does not support a conclusion that the parties were in a de facto relationship. The parties travelled on separate flights to China in May 2017 and other than the applicant's claim that they lodged the visa application together, which cannot be verified, did not appear to have spent any time together in China. The applicant did not give a convincing reason as to why they did not travel together, saying that [Mr A] was returning a day early to spend time with his friends and family. The applicant re-entered Australia in July 2017 without [Mr A], who did not re-enter until November 2017, at which point he gave his intended address at Wolli Creek, which was a friend's address and not the applicant's address. He claims in his email responding to the notice that "writing 62/545 Pacific Highway, St Leonards on IPC [[in] November 2017] would make me heart broken, so I wrote the Wolli Creek address".

47. When asked about what was happening between them during this period apart from May to November 2017, the applicant said they had discussed marriage but then [Mr A] started to have doubts and concerns perhaps because his parents did not approve, and she initially said that this occurred in August/September 2017. [Mr A] also refers to the parties having been in a 'cold war' with each other in August 2017. However, when it was put to the applicant that this seemed to suggest that they were not in a de facto relationship when the visas were granted in October 2017, she said that she had only noticed some changes in him but they had attempted to reconcile when he returned to Australia in November 2017. It appears however from [Mr A]'s email that he was not even aware that the applicant was not living in the suburb of St Leonards any longer having moved to an address in the suburb of Gordon in August 2017. While both he and the applicant claim that they tried to reconcile after his return, the Tribunal is not persuaded that this did occur.
48. If the parties were ever in a de facto relationship, the Tribunal would have expected that there would be more evidence of this up until the visa was granted. Instead, the only evidence other than their own assertions at any time before the application or up to the time the visa was granted were statements for a bank account in joint names from February 2017 and a [Telecommunications company] statement of one party from January 2017 to April/May 2017 at St Leonards.
49. Certainly by the time the applicant's citizenship application was lodged in October 2018 by '[Mr B]', despite the form being completed to reflect that she was in a de facto relationship with [Mr A], neither party is claiming that they were. Following the Tribunal's letter of 23 February 2022, she claimed that '[Mr B]' had put the application together while she was overseas from 23 July 2018 to 4 October 2018 and had not asked about her relationship status but made an assumption; she added if she had been aware that her relationship status needed to be updated, she would have done so. It is claimed that the applicant had again relied upon '[Mr B]' and that he had suggested withdrawing the application shortly after receiving a natural justice letter sent in July 2019. She claims that she was not informed by '[Mr B]' of this letter and it was submitted that she was in this way denied two opportunities to address the issues raised regarding bogus documents and incorrect information because '[Mr B]' was acting without authority.
50. The Tribunal accepts that she likely did not receive the natural justice letter as it was sent to an email address that appears not to have been used by the applicant. Aside from the email address and the relationship status, other information contained in the application such as former addresses appear to have been correct as referred to in the delegate's decision record. Based on her own claims in her statutory declaration of 5 January 2022, she agreed to [Mr B]'s advice to withdraw from the application as she was distracted at the time. It appears that the preparation, lodgement and subsequent withdrawal were all done with the applicant's knowledge.
51. Having regard to the information before the Tribunal both prior to and following the lodgement of the application, the Tribunal accepts that [Mr A] and the applicant were known to each other. But it does not accept that they were in a de facto relationship from April 2016 as claimed in the visa application form. This is because, other than their own claims, there is limited evidence of a genuine and continuing relationship, mutual commitment to a shared life and cohabitation or not living separately and apart on a permanent basis from that date until the visa was granted.
52. The applicants declared that the information given on the visa application form, which includes that their de facto relationship began from April 2016, was correct. The Tribunal finds that while the parties knew each other, they were not in a de facto relationship from April 2016 and that incorrect information was given in the visa application form regarding

their relationship. For this reason, the Tribunal finds that there was non-compliance with s 101(b) by the applicant in the way described in the s 107 notice.

Should the visa be cancelled?

53. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s 107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s 109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s 109(2).
54. In exercising this power, the Tribunal must consider the applicant's response (if any) to the s 107 notice about the non-compliance, and have regard to any prescribed circumstances: s 109(1)(b) and (c). The prescribed circumstances are set out in reg 2.41 of the Regulations. Briefly, they are:
- the correct information
 - the content of the genuine document (if any)
 - whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document
 - the circumstances in which the non-compliance occurred
 - the present circumstances of the visa holder
 - the subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act
 - any other instances of non-compliance by the visa holder known to the Minister
 - the time that has elapsed since the non-compliance
 - any breaches of the law since the non-compliance and the seriousness of those breaches
 - any contribution made by the holder to the community.
55. While these factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedural Advice Manual) PAM3 'General visa cancellation powers', which refers to matters such as the consequences of cancelling the visa, international obligations and any other relevant matters.
56. Having considered all of the evidence, the Tribunal has formed the view that the correct information was that the parties were not in a de facto relationship for the claimed period prior to the application being made. At most, the limited evidence indicates that they were known to each other and were friends, but other than their own claims in response to the visa cancellation, no evidence from others was provided to the Tribunal as would be expected of a genuine de facto relationship to support their claims. Interestingly, not one of the statutory declarations provided to the Tribunal from persons who attest to the applicant's good character refer to her claimed de facto relationship with [Mr A]. While it appears only two of the persons knew the applicant prior to September 2018, neither have referred to their relationship in any way.

57. The false claims became apparent following investigation by the Department of some documents that were provided as evidence of their de facto relationship, which are identified above. In considering the content of the genuine documents, the information before the Tribunal is that the bank account statements for the period 1 July 2016 to 31 December 2016 was not registered in both their names at the address listed on the statement. In respect of the [Telecommunications company] account statements for mobile phone numbers which did belong to the applicants, they were not registered in the applicants' names at the Rhodes address which appears on those documents. The addresses should have been U601/6 Keats Ave Rockdale NSW 2216 and 22/50-54 Forsyth Street, Kingsford NSW 2032 as set out in the decision record at page 6.
58. In the circumstances, the Tribunal considers that the grant of a Subclass 189 visa to the applicant was based partly on incorrect information and/or bogus documents. This is because that visa could only be granted to the applicant once it was determined that the applicant was a member of [Mr A]'s family unit. The definition of 'member of the family unit' includes a de facto partner, which is defined in s 5CB. The definition of de facto partner required that the applicant and [Mr A] were in a de facto relationship. The assessment of whether they were in a de facto relationship requires consideration of whether: they have a mutual commitment to a shared life to the exclusion of all others; the relationship between them is genuine and continuing; and they live together; or do not live separately and apart on a permanent basis; and they are not related by family. The Tribunal considers that the supporting documents listed above which were found to have been fraudulently altered were provided to support the claim that they were living together at an address in Rhodes from April 2016 onwards, and thus the decision relied in part on the information given in the visa application form and the supporting documents which had been altered without authority to do so.
59. The circumstances in which the non-compliance occurred were that the applicant had been unsuccessful in obtaining a visa through her employment with [Company 1] and [Workplace]. She had completed her Master's studies and her student visa had ceased. It appears to the Tribunal that she had run out of options to remain in Australia. Although there is no indication on the application form that an agent assisted with the application, the applicant claims that she relied on the professional assistance of '[Mr B]' whose company she claims was cancelled in August 2018, whom she had believed was a professional agent. The applicant has not presented any information such as a copy of a service agreement or contract, or any evidence of communications with him. [Mr A] does not refer to having used and relied upon an agent to make the visa application. Notwithstanding this, the Tribunal accepts that an 'agent' or third party was involved, as the email addresses provided on the visa and citizenship application forms do not appear to be the same as those previously used by [Mr A] and the applicant. The Tribunal accepts that she did not receive the NOICC for this visa and that she would have responded to the natural justice letter for the citizenship application had she received it, given the gravity of the situation (i.e possible cancellation of a permanent visa).
60. In the circumstances, the Tribunal finds that the applicant had entrusted the entire application process to another party, and even if she had not given explicit instructions to the person to give incorrect answers or bogus documents, the Tribunal is of the view that she knew this would happen based on the paucity of their evidence regarding her claimed de facto relationship with [Mr A]. She also admits to not having checked through the application, and it is the responsibility of any applicant for a visa to ensure the information given on their application is correct.
61. The present circumstances of the visa holder are that she has lived in Australia for around 9 years since first arriving on a student visa, and has registered a business and holds a [Professional] licence registration in NSW. The applicant has a Masters degree from

[University] and owns four properties in different suburbs in Sydney, Australia. She claims to have sold her properties and insurance in China and that she is pursuing a claim against a property development company in Australia which has gone into liquidation, although the Tribunal is not aware of any limitations if she is not physically in Australia. It is not claimed that she is in a de facto or spouse relationship with [Mr A] or any other party, but it is submitted that her 'family' are the 'oocytes' retrieved on 7 April 2021 and frozen by [a specialist fertility clinic] in Sydney, Australia, and her cat. It is submitted that the cat has digestive issues and cannot fly on planes due to his weight exceeding 5 kilograms. The Tribunal has also taken into account that the visa that was cancelled had been granted in October 2017 and that around 4 and a half years have passed since then.

62. In terms of whether there are children whose interests would be affected, the applicant does not claim to have any children but gave evidence of having frozen 'oocytes'. The Tribunal does not consider that it could be said that there are children whose interests would be affected by cancellation of the applicant's visa in this case. It acknowledges that single women in China face difficulties with accessing reproductive assistance and may face discrimination. The Tribunal has taken into account these matters to support why the visa should not be cancelled.
63. The applicant was granted the visa as the de facto partner of [Mr A]. It appears that his visa was also cancelled whilst he was overseas. There would not be any consequential cancellations under s 140 in this case.
64. There is nothing before the Tribunal to indicate that cancellation of the visa would lead to the person's removal in breach of Australia's non-refoulement or family unity obligations. There is no evidence, and the applicant does not explicitly claim, that Australia has protection obligations towards her. The Tribunal further notes that the applicant is able to make an application for a protection visa if she believes Australia owes her protection obligations. There is nothing in the applicant's circumstances which prevents these claims of harm being canvassed in a protection visa application.
65. In terms of mandatory legal consequences, if the applicant's visa remains cancelled, unless she is granted another visa, the applicant would be an unlawful non-citizen. If she fails to depart Australia before the bridging visa expires, she may be detained and removed. Other than a limited number of visas, which includes a protection visa application, the applicant would be prevented from making a valid visa application in Australia without the Minister's intervention. There may be restrictions on the applicants' future travel and future visa applications as a consequence of the cancellation. The Tribunal considers these restrictions to be a legitimate consequence of providing incorrect answers and bogus documents to obtain a benefit that she would not have been entitled to.
66. The Tribunal has considered the degree of hardship that may be caused to the visa applicant and accepts that she wishes to remain in Australia and has lived in Australia for several years. She has provided statutory declarations from friends who attest to her good and caring character, giving examples of when she has helped and cared for others. She claimed at the hearing that she has nothing in China, no friends or network and no relationships, but then when asked admitted that her parents remain in China. She then claimed that they lived in a very conservative city and she will shame her parents because she is not yet married and is considered old and does not want to return there having left there after high school. The representative added that the applicant would have responded if she had received the NOICC and the natural justice letter, that she has ties in Australia and that she would end up in a mental hospital if she has to return to China. The latter was not a claim made by the applicant herself and appears to be an assertion which is not corroborated by any evidence. In respect of her concerns about returning to her hometown, the Tribunal has taken into

account that she does not wish to return there and the possible hardship if she has to establish herself in a different part of China.

67. Considering the matters raised, the Tribunal accepts that the cancellation of the visa would cause a degree of hardship to the applicant as her plans are to live and work in Australia where she has friends, owns properties and may decide to become pregnant in the future.

Summary

68. The Tribunal has formed the view that there was a breach of ss 101(b) and 103 of the Act in the way described in the NOICC and that there are grounds for cancelling the visa. The Tribunal has considered the totality of the applicant's circumstances. The Tribunal has taken into account that there are reasons why the visas should not be cancelled, which includes the applicant's life in Australia and the difficulties she may face in accessing reproductive assistance in China as a single woman and the possibility she will not be able to have her cat travel to China due to restrictions on travelling on planes. The Tribunal accepts that she is well regarded by her friends in Australia and that she may find it difficult on return to China, where she may need to re-establish friendships and other relationships. It notes however that her parents remain in China and that she has previously been employed by different businesses in China as well as starting her own business there and opened a Culture Club which she claims was highly successful. In the Tribunal's view, the applicant would be able to start again in any city in China if she decided not to return to her hometown, as she will have no difficulties with the language and understands the culture having lived most of her adult life in China. It is of the view that the applicant is adaptable and would be able to return to China to live and work without too much difficulty with her experience working in Australia possibly being of some advantage. The Tribunal acknowledges that she may face difficulties if she wished to do become a mother as a single woman in China due to restrictions in accessing IVF treatments.
69. Against these considerations, the Tribunal places significant weight on the fact that the applicant was granted a permanent visa to remain in Australia for which she was not entitled, as it does not consider that she was in a genuine de facto relationship with [Mr A] from April 2016 for the reasons outlined above. He was the applicant who satisfied the primary criteria based on his skills and qualifications. The applicant was relying on his ability to satisfy the primary criteria as there is no suggestion that she would have met the requirements for the visa on her own skills and qualifications. This undermines the integrity of Australia's immigration system.
70. The significance of the breach in giving incorrect information and bogus documents outweigh, in the Tribunal's view, the hardship and difficulties that may be faced by the applicant on return to China.
71. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s 107 of the Act. Further, having regard to all the relevant circumstances, the Tribunal concludes that the visa should be cancelled.

DECISION

72. The Tribunal affirms the decision to cancel the applicant's Subclass 189 - Skilled - Independent visa.

Wan Shum
Member

ATTACHMENT – *Migration Act 1958* (extracts)

5 Interpretation

- (1) In this Act, unless the contrary intention appears:
- bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: **Bogus document** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

101 Visa applications to be correct

A non-citizen must fill in or complete his or her application form in such a way that:

- (a) all questions on it are answered; and
- (b) no incorrect answers are given or provided.

103 Bogus documents not to be given etc.

A non-citizen must not give, present, [produce]* or provide to an officer, an authorised system, the Minister, the Immigration Assessment Authority, or the Tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented, [produced]¹ or provided.

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:
- (a) giving particulars of the possible non-compliance; and
 - (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
 - (i) if the holder disputes that there was non-compliance:
 - (A) shows that there was compliance; and

*This wording applies to documents given, presented, produced or provided on or after 4 November 2014: Schedule 7 to *Counter Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (No.116, 2014).

¹

- (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or
 - (ii) if the holder accepts that there was non-compliance:
 - (A) give reasons for the non-compliance; and
 - (B) shows cause why the visa should not be cancelled; and
- (c) stating that the Minister will consider cancelling the visa:
 - (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
 - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
- (d) setting out the effect of sections 108, 109, 111 and 112; and
- (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
- (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
 - (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
 - (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

108 Decision about non-compliance

The Minister is to:

- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder in the way described in the notice.

109 Cancellation of visa if information incorrect

- (1) The Minister, after:
 - (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
 - (c) having regard to any prescribed circumstances;
 may cancel the visa.
- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.